Analyses and Studies
Analizy i Studia

CASP
Centre for Analyses and Studies of Taxation
Centrum Analiz i Studiów Podatkowych

No. 2(10) | November 2020 pp. 33–43 ISSN 2451-0475

Post-ATAD Fight against Tax Evasion in the Czech Republic

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The topic of tax evasion is a much-debated issue in the scientific community. In the context of the process of globalisation and the development of international trade, it can be stated that this problem has taken on a global dimension. For this reason, different Member States take different measures to prevent or eliminate tax evasion. The European Union is also such a case in the field. One of these initiatives is the Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market. This Directive is intended to contribute to this ambitious goal. The paper discusses its implementation in the Czech Republic. The aim of this paper is to evaluate the effectiveness of post-ATAD fight against tax evasion in the Czech Republic, while verifying the hypotheses: a) the Czech Republic has adequately harmonised its national legal order under the relevant Directives; b) the fight against tax evasion is currently more effective in the Czech Republic.

Keywords: tax, tax law, tax avoidance, tax evasion, ATAD
JEL Classification: K34, K33

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Introduction

Taxes are an essential part of our lives. Historically, the beginnings of taxes can be found in ancient Greece and Rome (Babčák, 2019, pp. 18–19). The formation and existence of a tax duty is also linked to the efforts of individuals to pay as low tax as possible. We think that everyone has a fundamental right to pay taxes only at the legal rate according to substantive and procedural legal provisions. Some authors say that this is an expression of natural law (Čollák, 2016, pp. 39–58) or others say that it is a natural instinct of individuals (Gomułowicz, Małecki, 2008, p. 273).

On the other hand, there is a very thin line between conduct in accordance with the law in force and an acting that is already contrary to law, whether there is an abuse of law or not. Admittedly, there may also be a situation where an acting is assessed by the tax authorities as an abuse of law, irrespective of the actual intention of the taxpayer. Here we also come to the question that, even though the legal systems of the states regulate the institutes that can achieve an optimal tax liability, tax practice shows that in many cases they do not find their practical application, which is to the detriment of individuals' personal-property interests.

However, the existence of illegal tax evasion is not exceptional, and it can be stated that it is a fairly common phenomenon in practical life. With the expansion of international trade, there is also an increase in the number of tax evasion cases worldwide. This, together with technological developments, contributes to greater sophistication in tax avoidance practices,[1] which makes it difficult to detect them enormously.

The national legislators are also trying to respond to this, but at the same time the issue has not escaped the attention of some international organisations, such as the Organization for Economic Co-operation and Development (hereinafter referred to as the OECD) and the European Union (hereinafter referred to as the EU). They are working towards a common, coordinated, and targeted action by Member States to solve this problem, which tax evasion is undoubtedly.

At present, three levels of initiatives to combat tax evasion can be identified, namely the OECD, the EU, and individual Member States. OECD activities are undoubtedly also the basis for EU action in a given field, which, unlike OECD documents, is binding. However, there are also Member States that adopt autonomous instruments against tax avoidance practices.

It is, therefore, clear that the topic of this paper has a strong international and European context. The aim of this paper is to evaluate the effectiveness of post-ATAD fight against tax evasion in the Czech Republic, while verifying the hypotheses:

- the Czech Republic has adequately harmonised its national legal order under the relevant Directives;
- the fight against tax evasion is currently more effective in the Czech Republic.

In order to fulfil the stated goal, we used several methods of writing scientific papers, but mainly analysis due to the necessity to analyse the individual elements of the researched instruments, synthesis which can lead to the formulation of conclusions and opinions de lege ferenda, partly the historical method in order to show the historical context of the selected institutes, and finally, comparison for the comparison of the legislative wording in the ATAD Directive and the national version of the implementing institute.

Given that a relatively short time has elapsed since the implementation of the European Directives aimed at combating tax evasion, there is a lack of comprehensive findings from the field in the scientific community. That is also the reason why the vast majority of the text was based on valid legislation using selected literature.

EU initiatives to combat tax avoidance practices

As stated above, the fight against tax evasion has not escaped the the EU's attention. It largely followed the OECD Action Plan, also known as *Base Erosion and Profit Shifting* (hereinafter referred to as the BEPS).[2] The EU is an international organisation of a regional nature (Mazák, Jánošiková, 2009, p. 740), but the search for a consensus on measures to combat tax evasion at the Union level is more than desirable. This is connected to the existence of a single internal market, which can be understood as "an area without internal frontiers in which the free movement of goods, persons, services and capital is guaranteed in accordance with the provisions of the Treaties (Treaty on

[1] For the purposes of this paper we use the terms tax evasion and tax avoidance in a synonymous sense.

[2] Although the BEPS Action Plan has been a major shift in the fight against tax avoidance practices, it is already proving to be slightly outdated in relation to the digital economy and the phenomena which it brings [OECD, 2019].

the Functioning of the European Union, Art. 26)." The adoption of various unilateral measures could create obstacles to the realisation of the freedoms guaranteed by EU primary law, as well as contributing to the creation of other disproportions in the internal market.

The EU tax policy has three areas: indirect taxation, direct taxation, and finally, tax administration, international assistance and cooperation between Member States. As far as indirect taxation is considered, there has been a complete harmonisation of both VAT, as general indirect tax, as well as excise duties. In other areas Member States are more reticent and retain tax sovereignty. In view of the fact that there is a wide range of legal acts, of which, if not as a primary goal, or at least as one of the primary goals, is to prevent tax evasion, we think that there is forming the fourth area of EU tax policy – anti tax avoidance rules.[3] Other academics (Bujňáková, 2017, p. 78) state that one of the most important and essential questions of tax policy is the fight against tax evasion, which only supports our reasoning.

The legislative wording of individual measures to prevent or limit tax evasion has to be sought in secondary law, since primary law creates only a legal framework and formulates the basic ideas, which are subsequently specified in secondary legal acts.[4] In the next section of this paper, we will focus on Council Directive (EU) no. 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that have a direct impact on the functioning of the internal market (hereinafter referred to as the ATAD Directive).

ATAD Directive

The ATAD Directive is currently the strongest manifestation of the EU's will to solve the problem of tax evasion, because taxes represent the most important revenue for Member States' public budgets (Hrabčák, 2019, pp. 163–175). The question remains, however, whether this does not merely obscure the purpose of the legislation, which was intended to create space for harmonising corporate tax and adopting a proposal also known as the *Common Consolidated Corporate Tax Base* (hereinafter referred to as the CCCTB). As already stated above, Member States are reluctant to fully harmonise direct taxes, but on the other hand, they are interested in the fight against tax avoidance practices. This can be a sophisticated step taken by the EU in its efforts to adopt the CCCTB.[5]

Apart from these considerations, the ATAD Directive was adopted within the anti tax avoidance package presented by the European Commission on 28th January 2016 (Hrabčák, 2019, pp. 236–248). In addition, there was adopted Council Regulation (EU) No. 2017/952 of 29th May 2017, amending Directive (EU) No. 2016/1164 as regards hybrid non-compliance with third countries (hereinafter referred to as the ATAD 2). However, ATAD 2 only concerns hybrid mismatches and leaves other measures unchanged.[6] These EU acts are intended to establish a minimum standard of protection for Member States' fiscal interests, while Member States may also have stricter legislation.

As regards the implementation period of the Directives, it was fixed until 31st December 2018, with the effect from 1st January 2019. There are two exceptions from that rule, namely exit tax for which the period is postponed until 31st December 2019 (with effect from 1st January 2020) and the rules against hybrid mismatches with the implementa-

[3] This is merely a theoretical opinion, in relation to which there may be justified reservations about the fact that many legal acts could be included in other already established areas.

[4] According to Art. 288 of the Treaty on the Functioning of the European Union there are secondary acts of regulations, directives, decisions, recommendations and opinions. In particular, regulations and directives will be relevant from the point of view of tax law and the fight against increasing tax evasion.

[5] A similar opinion is shown by, for example F. Bonk, who states that this is an important step in the harmonisation of corporate tax (Bonk, 2017, p. 880).

[6] This Directive extends the hybrid mismatches measures to the relations between EU Member States and third countries (Boháč, Hrdlička, 2018).

tion period until 31st December 2021, with the effect from 1st January 2022.

The science of tax law distinguishes two groups of rules, namely the general anti-abuse rule (hereinafter referred to as the GAAR) and the special anti-abuse rules (hereinafter referred to as SAARs), which include:

- limitation of interest deductibility;
- exit taxation;
- rules for controlled foreign companies;
- rules to combat hybrid mismatches (Radvan, 2016, p. 57).

To some extent, this EU initiative is inspired by the OECD BEPS action plan, with some exceptions such as exit tax (see below). The individual measures can be examined from three levels, namely:

- European level – this is the legislative text of the individual measures contained in the ATAD and ATAD 2 Directives;
- national level – methods and forms[7] of implementation vary from one Member State to another, which could ultimately give rise to various application and interpretation problems (see below);
- jurisprudence – for some instruments there has been developed relatively extensive case law of the EU Court of Justice, which has also formed them in some way.

In the following text focusing on individual measures, we aim at the national level and point out what form they take in the legal order of the Czech Republic. Due to the relative scope of the changes that had to be made, the Government of the Czech Republic introduced a 'package' of legislative changes to tax laws reflecting ATAD obligations. As part of the paper, we maintain a systematic arrangement of the various ATAD tools, without any arrangement according to their importance.

ATAD anti-tax evasion tools and their implementation in the Czech Republic

Limitation of interest deductibility

The first of the rules is the limitation of interest deductibility according to Art. 4 ATAD.[8] This rule was transposed by Act No. 80/2019 Sb., amending the Act of the Czech National Council no. 586/1992 Sb., Income Taxes Act, as amended (hereinafter referred to as the Income Taxes Act), with the effect from 1st April 2019. The amendment of the Income Taxes Act introduced § 23e, which deals with the limitation of the deductibility of interest and which follows § 23f enacting exceptions to the mentioned rule.

The essence of this instrument is that exceeding borrowing costs[9] are eligible for taxation only up to the statutory limit, which is calculated for tax purposes from tax profits before tax, interest, depreciation and amortisation. The application of that measure, therefore, increases the economic result to the extent that the statutory limits have been exceeded.

Exceeding borrowing costs are not only interest but also other borrowing-related financial expenses and charges, exchange rate differences relating to borrowing costs, interest included in the retaliation for the retirement of assets for remuneration and others (Pejclová, 2020). In contrast to the low-capitalisation test, this expense includes interest that is included in the valuation of assets, regardless of whether such costs are borne by dependent or independent persons.

As regards the limits set by the Income Taxes Act, they are set by one of the higher amounts, namely:

[7] It is clear from Art. 288 of the Treaty on the Functioning of the European Union that in the implementation of the Directives there is freedom in relation to the choice of forms and methods, but it is important that the objective of the Directive is achieved.

[8] We can state that this rule has also quite an extensive case law of the Court of Justice of the EU (Štrkolec, Bonk, 2019, pp. 51–59).

[9] This is the difference between otherwise eligible borrowing expenditure and taxable borrowing income.

- 30% of Tax profits before interest, taxes and depreciation,[10] or
- 80 000 000 CZK.[11]

The limit of 80 000 000 CZK will apply in all cases as long as 30% of EBITDA does not exceed this threshold. Certainly, the restriction will not apply in situations where such costs are equal or lower than the amount of 80 000 000 CZK. The amount by which the statutory limit is exceeded will increase the taxpayer's tax base.

However, the legislator respected the principle of tax fairness. It is expressed in Sec. 23e(6) of the Income Taxes Act. If the difference between income and expenditure has been increased due to the limitation of the eligibility of exceeding borrowing costs, the amount by which this difference has been increased may deteriorate the financial situation or the difference between income and expenditure in subsequent taxation periods or periods for which the taxpayer submits a tax declaration. This is possible up to the amount of the positive difference between the limit of eligibility of exceeding borrowing costs for the tax period or the period for which the taxpayer submits a tax declaration. However, such a right is not transferred to the legal successor.

Taxpayers of corporate income tax will test 2 limits of the tax deductibility of interest and related costs. Firstly, they have to test the capitalisation of loans and mortgages between dependent persons and after that, they have to set exceeding borrowing costs and compare them with the statutory limits.

However, the ATAD Directive contains specific provisions related to the groups that have not been implemented into Income Taxes Act, which we evaluate positively regarding the fact that consolidated taxation is not allowed in the Czech Republic. Similarly, the Czech legislation does not contain a provision enacting the exemption of the ATAD Directive, which allows for the exemption of interest on loans granted to finance long-term public infrastructure projects, and the same applies to loans that were concluded before 17th June 2016. The exclusion may not apply to subsequent changes of this loan.

Par. 23f of the Income Taxes Act regulate only entities which are not subject to the above restriction. Such entities include e.g. banks, insurance companies, reinsurance companies, securities dealers, etc. In view of what has already been said, it is clear that the legislator has implemented de minimis level of the above-mentioned rule.

Exit tax

The legislation of exit tax is contained in the provisions § 23g and § 38zg of the Income Taxes Act.[12] Sec. 23g(1) of the Income Taxes Act expresses the nature of exit tax. According to this provision, it is "the transfer of such assets for remuneration to themselves for a price negotiated between independent parties in ordinary business relations under the same or similar conditions [Act of the Czech National Council No. 586/1992 Sb., On Income Tax, as amended, Sec. 23g(1)]". In other words, there is a fiction of selling "assets" to themselves while respecting the principle of an independent market.

The tax base of exit tax will be the market value of the assets (it must correspond to the price at which independent persons would transfer a similar asset, in accordance with Sec. 23(7) of the Income Taxes Act), which will be reduced by relevant tax expense according to § 24 of the Income Taxes Act. Thus, in order to avoid double taxation, exit tax would be considered as a new tax value of the asset by the next transfer to another state. By applying a 19% tax rate to the tax base, we arrive at the taxpayer's own tax duty, who transfers assets abroad.

As regards the scope of application, the legislator of the Czech Republic decided to apply exit tax to the following situations:

- the transfer of property of a taxpayer of corporate tax who is a Czech tax resident from

[10] In this context, the term EBITDA is used, and the term ATAD is also taken into account

[11] Currently 1 euro is equivalent to 27 CZK.

[12] The amendments required by the ATAD in connection with the introduction of exit tax entered into force until 1st January 2020.

the Czech Republic to his/her permanent establishment located abroad;

- the transfer of a non-resident corporate taxpayer's property from a permanent establishment located in the Czech Republic abroad if, as a result of this transfer, the tax duty in the Czech Republic does not apply to the income resulting from the subsequent transfer for remuneration;
- the transfer of property connected with the transfer of a corporate taxpayer's residency from the Czech Republic abroad if, as a result of the transfer, the tax duty in the Czech Republic does not apply to the income resulting from the subsequent transfer of such assets for remuneration.

An important condition highlighted by the legislator is that the state from whose territory the asset is transferring must lose the right to tax caused by such a transfer (Kapoun, 2019). The loss of the right to tax occurs in those states with which the given state has concluded double taxation treaties and prefers the exemption method as a method of avoiding double taxation. In the present case, although the state does not formally lose the right to tax income, the application of the exemption method brings such an effect.

According to the Explanatory Report to the Income Taxes Act amendment introducing exit tax, it is also explained for what reasons the transfer of assets and business activities abroad was omitted within the application scope of exit tax. The author of the amendment of the Income Taxes Act stated that he subsumed the transfer of assets under the transfer of the taxpayer's property. In our opinion, however, this is not entirely correct, because it does not highlight that even when moving part of the property, namely assets, exit tax will be applied. As regards the absence of another situation – the transfer of business activity – it is argued that the situation is already subject to the transfer of property from a permanent establishment located in the Czech Republic abroad, since when the transfer of business activity from a permanent establishment leads to the disappearance of the permanent establishment. In this case, too, we cannot agree because a permanent establishment can carry out several activities. However, if part of the business activities were transferred, it would not be possible to tax such a transfer under the legislation in force.

The fiction of selling themselves does not apply if the taxpayer can be expected to return within 12 calendar months to the territory of the Czech Republic and this transfer abroad has been linked to the financing of securities, assets posted as financial collateral, or the transfer is due to the fulfilment of the capital adequacy requirement laid down by law or for the purpose of liquidity risk management prescribed by law.[13] In the absence of a return of assets to the Czech Republic, the fiction shall apply in the last taxable period or the period for which the taxpayer submits its tax declaration in which this condition could be met. These cases lead de facto to deferring payment also in these situations where conditions of deferring tax payment are not met.

The Czech legislator also allowed taxpayers to defer payment of the tax in equal instalments.[14] Specifically, this is dealt in the provision § 38zg of the Income Taxes Act, according to which, at the request of the taxpayer, the tax administrator will allow deferring the payment of the part of exit tax for a maximum period of 5 years from the tax due date. However, another necessary requirement is that there is a transfer of 'assets' to another Member State of the EU or a state which is part of the European Economic Area,[15] which has concluded an agreement with the Czech Republic or the European Union on mutual assistance for the recovery of tax debts equivalent to that contained

[13] The mentioned provision of Income Taxes Act fully corresponds to the provision of Art. 5 sec. 7 of the ATAD Directive, which foresees such an exclusion.

[14] In essence, this involves taking over the adjustment of the deferred tax payment in instalments according to Art. 5 sec. 2 of the ATAD.

[15] A standard example of a country outside the EU but, on the other hand, a party to the Agreement on the European Economic Area is Switzerland, with which the Czech Republic has lively trade relations.

in Council Directive (EU) No. 2010/24 /EU of 16th March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures.

Certainly, the issue of distributing tax payment in instalments is not new in the legal order of the Czech Republic. Already § 156 and § 157 of Act no. 280/2009 Sb., The Tax Procedural Code, as amended (hereinafter referred to as Tax Procedural Code) regulates such a possibility in general. Thus, the adjustment of deferring exit tax payment is lex specialis to the general provisions contained in the Tax Procedural Code.[16] As regards interest on the deferred part of the tax, it is true that even if the tax administrator has the right to demand payment from the taxpayer, there is the possibility of applying the provisions on the remission of such interest according to § 259b et seq. of the Tax Procedural Code.

There are some differences compared to the general regulation contained in the Tax Procedural Code. The first is that, if the conditions are met under a special scheme, the taxpayer is entitled to a distribution of the tax payment in instalments. Another difference concerns the possibility of deferring payment of only part of the unpaid tax and not the tax as a whole. The legislator also implemented Art. 5 sec. 4 (e) of the ATAD Directive, according to which the entire debt becomes recoverable in case of non-payment of any of the instalments.[17]

Therefore, if the instalments of exit tax are not respected, the decision loses its effectiveness. In addition, the decision loses effectiveness if the taxpayer transferred ownership of the transferred property, and also if the property was transferred without changing ownership to a state other than an EU Member State or a European Economic Area State. The purpose of this provision is to prevent abuse of the mechanism thus established. Despite the fact that the ATAD Directive was not retained at first view, because it considers the entry into liquidation or the declaration of bankruptcy of the taxpayer as a case of recovery of the tax debt. This fact, however, already results from the general legislation contained in Sec. 157(5), the second sentence of the Tax Procedural Code, and therefore, applies regardless of the absence of special and explicit expression of such an option.

It is also interesting that in the amendment of Income Taxes Act it was assumed that the provisions of exit tax will be incorporated into them in a systematic order (§ 23g and § 23h), but the real form is slightly different, which, in our opinion, does not contribute to the clarity of the tax legislation, and therefore, it would be preferable for the legislator to adhere to the original idea.

With regard to the disputed scope of application of this measure, which was chosen by the Czech legislator, we also have reasoned doubts whether the purpose required by the Union legislature has been preserved. On the other hand, we appreciate the fact that there has been a clear link to the existing tax law institutes.

GAAR

The development of the GAAR in the Czech Republic was similar to most of EU Member States, in that tax legislation did not include the statutory GAAR for a very long period (Landgráf, 2018). Obviously, this fact had no influence on the fact that the concept of prohibition of the abuse of law in the tax law area was already elaborated in the case law of the Czech courts.[18] Similarly, the principle of the primacy of content over form (so-called the

[16] We can point out e.g. that the general provisions on the time limit for the tax authority for issuing such a decision authorising the taxpayer to pay tax in instalments because the Income Taxes Act does not contain specific provisions governing the issue.

[17] There is a strong emphasis on tax discipline and the legislator did not provide for any possibility of remedy within the additional period. This is, certainly, in accordance with Art. 3 of the ATAD Directive, respecting the minimum standard of protection.

[18] It is possible to point out the decision-making activities of the Supreme Administrative Court of the Czech Republic (e. g. the judgment of the Supreme Administrative Court of the Czech Republic, file no. 9 Afs 57/2015-120), which is based both on Knapp's doctrine of the abuse of rights and on the case-law of the Court of Justice of the EU (Radvan, 2016, p. 57).

informal principle), which penalised disguised acts, was also applied to cases of the abuse of law.

The Czech Republic was one example of the countries that left the Commission Recommendation of 6th December 2012 on aggressive tax planning unresponsive in their national legislation. The situation has changed with the ATAD Directive and Member States had to adopt the statutory GAAR, as we have already mentioned.

As the transposition deadline was set by the end of 2018, the Czech government presented a 'package' of legislative changes to tax laws, which included the statutory GAAR. With the effect from 1st January 2019, it became part of Sec. 8(4) of the Tax Procedural Code, as follows: "Tax administration does not take into account legal acts and other facts decisive for tax administration, whose prevailing purpose is to obtain a tax advantage contrary to the sense and purpose of the tax legislation (Act No. 280/2009 Sb. of the Tax Procedural Code, as amended, Sec. 8(4))".

The explanatory report on the amendment to the Tax Procedural Code also states that this is merely an explicit grounding of the prohibition of the abuse of law which already existed in the case law and in tax practice. It also states that this is a response to the European legislation, as well as to the increasing tendency of European states to explicitly adopt the statutory GAAR in their legal systems.

In relation to the transposed provision, it should be noted that the Czech legislator also went beyond what the ATAD Directive requires as well as several other Member States (e.g. the Slovak Republic). This is reflected in particular in the fact that Art. 6 of the ATAD Directive concerns only income tax, so the Czech statutory GAAR applies to all types of taxes.

Also, the expression 'prevailing purpose' means that the rule also applies to situations if a transaction has a different purpose, too. This complicates the situation of a taxpayer who has to prove, in the course of a tax procedure, in case of a number of purposes, that the proper economic objective is prevailing and it will not be enough that it will be one of the objectives, and/or purposes. On the other hand, we must state that the wording of the Czech legal GAAR is, nevertheless, more favourable for the taxpayers compared to the Slovak statutory GAAR.[19]

CFC rules

The purpose of controlled foreign companies rules (hereinafter also referred to as CFC rules) is to prevent situations where a parent company based in the Czech Republic would establish a subsidiary company in jurisdictions with low or non-tax jurisdictions to which it would subsequently transfer profits. This acting would result into tax avoidance in the Czech Republic and would be advantageous from an intra-group taxation perspective. Until the adoption of this rule, the situation in the Czech Republic was such that only profit shares paid by a non-resident taxpayer to a Czech tax resident were subject to income tax, with the exception of exempt income according to Sec. 19(1)(zi) of the Income Taxes Act.

Basically, there is a fiction according to which the performance of a foreign controlled entity receiving income from the entity in the Czech Republic are treated as if they were performed in the territory of the Czech Republic by the controlling company on condition that the controlled entity does not carry out substantial economic activity (see below).

CFC rules referred in Art. 7 and 8 of the ATAD Directive have been implemented in the provisions of § 38fa of the Income Taxes Act. In the context of implementation, it was necessary to introduce the concepts of controlling companies, controlled entities, and associates into the legal system.

The controlling entity is thus a corporate income taxpayer who is a Czech tax resident and at the same time fulfils the cumulative condition that it directly or indirectly participates in more than 50% of the registered capital or voting rights of the controlled foreign company or has a right to more than 50% of its profits. A Czech tax resident with a per-

[19] The Slovak GAAR will apply if even one goal (and not necessarily the main or prevailing one) of the transaction is the abuse of law, it will not be taken into account for tax administration purposes.

manent establishment in a country with which the Czech Republic has concluded the double taxation treaty using the exemption method as a method of avoiding double taxation will be also considered as a controlling company (Kapoun, 2019).

Another novelty in the Income Taxes Act is the concept of controlled persons. Controlled persons are persons who are non-resident taxpayers or permanent establishments who have a controlling person in the Czech Republic. The condition for applying the CFC rule to these persons is that they cannot carry on a substantial economic activity[20] and the tax on their income in the state of their tax residence must be less than half the tax to which such income would be taxed for a Czech resident.

As mentioned above, this rule focuses mainly on tax havens outside the EU. However, it should be noted that some EU Member States (e.g. Cyprus, Malta, and others) are also considered as tax havens. Whether it is or not a tax haven, in the present case it must be evaluated comprehensively. This means that not only the tax rate will be decisive here, but also other benefits that the states provide in various forms (e.g. tax holidays, tax cuts, etc.) (Brychta, 2019). Permanent establishment may be considered as a controlled entity for the purposes stated.[21]

The Income Taxes Act catalogue of terms has been also expanded to the affiliates. Affiliates are capital related persons[22] or persons where one person is entitled to at least 25% of profits of another person. Affiliates may be natural or legal persons, irrespective of whether they are tax residents or non-residents in the Czech Republic.

Thus, we can see that the legislator has adhered to the wording of the ATAD Directive as regards the setting of minimum limits of control over the controlled entity and has not adopted stricter rules of control.

This measure creates the possibility of including the activity of a controlled foreign company in the tax base of the controlling company, which is a Czech tax resident, and to tax their difference in tax rates also in the Czech Republic. The legislator, while respecting the ATAD, stipulated that it goes about the interest, royalties, dividends, income from the sale of goods and services between affiliates with very little or no added value. This is an off-accounting adjustment of the profit or loss of the controlling entity for the passive income[23] of controlled entities (Kapoun, 2019). It should be added that the ATAD Directive made it possible to choose two adjustments, either a full calculation of revenue or a general rule – the revenue from transactions constituting the abuse of law. From the above, it is clear that the first variant was used. We rate this very positively, also considering that if the second option were used, it could be abused by tax authorities in their tax procedure. This step increases the level of legal certainty of taxpayers, as it eliminates potential interpretative and application problems.

In our opinion, the instrument will contribute to reducing the number of companies using 'empty' entities without pursuing economic activity in order to minimise their own tax duty. Against this background, we also appreciate that the range of income that will be included in the parent company's tax base does not include other income, as this would create internal inconsistencies with the condition that a subsidiary cannot pursue a substantial economic activity from which such income could flow.

The ATAD Directive also allowed EU Member States to include exceptions to the application of the CFC rule, but the Czech legislator did not use this option. Taking into account what we have

[20] The ATAD Directive also allowed EU Member States to choose stricter criteria in relation to third States not party to the Agreement on the European Economic Area. In the Czech Republic, this option has not been used and the same approach is applied to such countries.

[21] A permanent establishment will also have to comply with the requirement that it will not pursue a substantial economic activity, but this will be an exceptional phenomenon in practice, because a permanent establishment would not arise if it did not execute a substantial economic activity and it becomes an empty entity.

[22] Persons in which one participates directly or indirectly in capital or voting rights of at least 25%.

[23] In addition to passive income here can be mentioned sorted income from various artificial transactions.

stated in this section of the paper, we note that the Czech Republic maintains only the minimum standard required by the European law.

Rules against hybrid mismatches

The original wording of Art. 9 of the ATAD Directive was not sufficient and, consequently, was adopted in the ATAD 2 Directive, which added the rule against hybrid mismatches to Art. 9a and 9b. The rule against hybrid mismatches before the amendment addressed only the issue of double deduction, i.e. cases where a certain deduction (typically in the form of expenditure) for the same fact was applied simultaneously in two states (Kouba, 2017).

In relation to the rule in question, it is possible to think and discuss its nature. In our opinion, as well as that of other experts (Kouba, 2017), this is not directly a substantive provision but rather a conflict rule. This view can be justified by the fact that the purpose of this rule is to deal with conflicting situations of tax deductibility.

Hybrid mismatches may arise as a result of the application of the rules of individual tax systems, different legal qualifications, financial instruments or the presence of permanent establishments. By the collision of different legislations and the rules contained therein, this can lead to a tax advantage in different forms (e.g. double reduction of the tax base with the same expenditure).

That rule shall apply between affiliates, which for the purposes of the CFC rule (see above) shall be understood as affiliates for the purposes of the CFC rule, provided that the condition of the limit of the share in the registered capital, voting rights or profit is at least 50%. That rule shall apply also between otherwise connected persons and the corporate income taxpayer and its permanent establishment.

There are three situations where it is necessary to increase the economic result or the difference between revenue and expenditure due to different legal qualifications:

- double deduction – this is the case where a fact reduces the tax base of affiliates several times and there is no corresponding increase in the tax base of those persons;
- deduction without inclusion – this is a situation when the payment between two affiliates causes, on the one hand, a reduction in the tax base without a corresponding increase in the tax base of the second taxpayer, and
- imported hybrid mismatches – represent a situation where an item that decreases profit or loss or the difference between the income and expenses of an affiliate is the source of another item that reduces the tax base of another affiliate in the above cases.[24]

Some cases have been dealt with by the Income Taxes Act prior to the amendment required by the implementation of the ATAD and ATAD 2 Directives. We can point out Sec. 19(1)(zi) of the Income Taxes Act, in which it does not allow the parent company to apply the exemption in respect to the holding of a share in a subsidiary in selected countries (see above).

Since the transposition deadline of the ATAD for hybrid mismatches was until 31st December 2019 and for reverse hybrid mismatches until 31st December 2021, it can be stated that the Czech legislator respected the above rule in advance and maintained the minimum standard.

Conclusion

The ATAD Directive is already implemented in the Czech Republic. Therefore, we have described this status as post-ATAD. In this paper, we tried to offer the scientific community a relatively comprehensive overview of the issue of individual measures to combat tax evasion, which the goal was based on – to evaluate the effectiveness of post-ATAD fight against tax evasion in the Czech Republic, while verifying the established hypotheses. The conclusions in relation to the hypotheses are as follows:

[24] Specific cases of application will depend mainly on the differences in other countries from the legislation in the Czech Republic.

Ad 1) The Czech Republic has adequately harmonised its national legal order under the relevant Directives

By synthesising the knowledge we have gained from the analysis of individual instruments, we came to the conclusion that the Czech legislator tended to adjust de minimis for most of mentioned measures. However, this is not the case of GAAR, where the legislator enacted a stricter rule to prevent the abuse of law. On the other hand, in the case of exit tax, we were rightly doubtful whether at least the minimum standard of protection according to Art. 3 of the ATAD (see above) was respected.

Ad 2) The fight against tax evasion is currently more effective in the Czech Republic

As regards the effectiveness of the instruments in question, it must be noted that it has been too short a time since their implementation to be able to make a relevant assessment. However, we must add in one breath that these rules certainly have the potential and (not only) ambition to contribute to reducing tax evasion. What we can say with certainty is that tax evasion will never be eliminated completely, even with these measures.

Acknowledgement

This article presents partial findings from the implementation of the project MUNI/A/1471/2019.

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Centre for Analyses and Studies of Taxation
Centrum Analiz i Studiów Podatkowych

· PUBLISHER ·

Centre for Analyses and Studies of Taxation SGH · Al. Niepodległości 162 · Warsaw 02-554 · Poland
Dominik J. Gajewski (General Editor) · Grzegorz Gołębiowski · Tomasz Grzybowski (Managing Editor)

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